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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 450

SCOTT A. BELDEN, ON BEHALF OF HIMSELF AND ALL OTHER POLICYHOLDERS OF THE UNION CENTRAL LIFE INSURANCE COMPANY, AN OHIO CORPORATION, SIMILARLY SITUATED,

Appellants,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY

APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE STATE OF OHIO

No. 29621

SCOTT A. BELDEN, ON BEHALF OF HIMSELF AND ALL OTHER POLICYHOLDERS OF THE UNION CENTRAL LIFE INSURANCE COMPANY, AN OHIO CORPORATION, SIMILARLY SITUATED,

Appellant,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Appellee.

COUNTER-STATEMENT OF APPELLEE AS TO JURISDICTION AND MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT.

COUNTER-STATEMENT OF APPELLEE AS TO JURISDICTION

Pursuant to the provisions of Rule 12, Paragraph 3, of the Supreme Court of the United States, appellee files its counter-statement disclosing certain matters and grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellant.

Nature of the Case

Belden, the holder of a life insurance policy in the face amount of $5,000.00, filed his petition against The Union Central Life Insurance Company in the Court of Com-

mon Pleas of Summit County, Ohio. The petition alleged that pursuant to the provisions of Sections 9364-1 to 9364-8 of the General Code of Ohio, The Union Central Life Insurance Company, a stock life insurance company, had commenced proceedings to become a mutual life insurance company. It was alleged that such a plan had been approved by a majority of the directors of said company and by a vote of the shareholders representing a majority of the capital stock outstanding. In substance, the further allegations of the petition were that if the plan were carried out, surplus funds belonging to the policyholders would be used to pay the shareholders for their stock, and that the corporation would be left with inadequate assets to secure the payment of the various policies as they fall due. Plaintiff prayed for an injunction restraining the company from proceeding under the above mentioned mutualization statutes of Ohio on the ground that they violated *Section 1, Article 2, Section 26, Article 2, Section 19, Article 1,* and *Section 28, Article 2,* of the Constitution of the State of Ohio, and also *Section 10, Article 1,* and *Section 1* of the 14th Amendment of the Constitution of the United States.

Defendant, The Union Central Life Insurance Company, filed an answer in substance alleging facts showing that no funds belonging to the policyholders would be paid to the shareholders under the plan; that under the plan there would remain a surplus of approximately $11,000,000 in excess of adequate legal reserves for the payment of outstanding policies as they fell due; that the action was prematurely brought since although a meeting of policyholders was called, it was adjourned without action; and further that the Superintendent of Insurance had not taken the action as provided in the above mentioned statutes of the State of Ohio.

Belden filed a demurrer to the answer. The Court of Common Pleas sustained the demurrer, and the defendant electing not to plead further, judgment was entered for the plaintiff.

The defendant appealed to the Court of Appeals for the Ninth Judicial District of the State of Ohio. In that court the pleadings were amended, and the case was submitted on the amended petition, amended answer, and demurrer of the plaintiff to the latter. It will be noted that the amended answer, while containing certain admissions, included, in accordance with the Ohio practice, a general denial as follows:

> "Defendant further answering denies each and every allegation of plaintiff's petition not hereinbefore specifically admitted to be true."

The Court of Appeals overruled the demurrer, and the plaintiff not desiring to plead further and electing not to offer any evidence, final judgment was rendered for the defendant.

Upon appeal by plaintiff to the Supreme Court of Ohio, the judgment of the Court of Appeals was affirmed. In affirming the judgment of the Court of Appeals, the Supreme Court in its opinion stated in part:

> "At the outset it is important to emphasize: • • • (3) that the controversies were disposed of in the Court of Appeals upon demurrers to the answers; and (4) that each of the appellants having failed to offer evidence in support of the allegations of his petition, there are no presently established facts (except those alleged in the answer, which are admitted by the demurrer thereto) before this court for consideration in determining the questions at issue." *Belden* v. *Union Central Life Ins. Co.*, 143 Ohio State 329, at 339.

Notwithstanding the foregoing condition of the record as recognized by the Supreme Court of Ohio, appellant

asserts in his statement as to jurisdiction (page 11) that appellee had exhausted all of the surplus arising on all the earnings on non-participating policies. We challenge this statement as contrary to fact. Moreover, we respectfully contend that there is no such allegation in the petition, but if there were, it stands denied and appellant has elected not to try to prove it.

Argument

The case proceeded on appellant's assertion that the State of Ohio had no power to pass the statutes in question. The sections of the General Code of Ohio attacked by appellant are very similar to the Codes of other states, such as New York, New Jersey and Pennsylvania, under which the mutualizations of many of the large life insurance companies of the United States have been accomplished. Appellant's contentions were (a) the statute as such necessarily operated to impair the obligation of plaintiff-appellant's contract; (b) the statute necessarily operated to take plaintiff-appellant's property without due process of law; and (c) the statute unlawfully delegated legislative power to the Superintendent of Insurance.

Considering these points in inverse order, it will be noted that the Supreme Court held that, properly construed, the sections of the Code in question did not constitute a delegation of legislative power. This argument was concerned solely with the Ohio Constitution, and we submit that no Federal question was or is presented.

The decision of a state supreme court to the effect that a statute of the state is valid under the state's constitution is not reviewable by the United States Supreme Court. In re *Kemmler,* 136 U. S. 436, 447; *McElvaine* v. *Brush,* 142 U. S. 155; *Sage* v. *Louisiana Board of Liquidation,* 144 U.

S. 647; *Powell* v. *Brunswick County*, 150 U. S. 433; *Peters* v. *Broward*, 222 U. S. 483.

It will be noted with respect to the question of impairment of contracts that under the insurance laws of Ohio, all of the terms of the policy or contract are required to be set forth in the written instrument. Section 9420, Paragraph 3, General Code of Ohio. Plaintiff-appellant obviously undertook to inject into this case a contract which does not exist, to the effect that the insurance company has covenanted not to change its corporate structure.

The Supreme Court of Ohio proceeding to a discussion and determination respecting the statute, at pages 348 and 349, (143 Ohio State) said:

> "We will now direct our attention to the second phase of the controversies—that the act is unconstitutional and void because of the operative effect thereof as applied to the respective plans.
>
> In the *Belden* case no meeting has been held, as yet, for the purpose of the policyholders voting to approve or reject the plan and in neither case has the plan ever been submitted to or approved by the superintendent. For aught we know from the record neither proposed plan may ever be consummated.
>
> In the *Belden* case the directors and shareholders have it in their power to rescind the plan and in both cases the superintendent may reject the plans. These facts alone form a sufficient basis to disapprove the claim of unconstitutionality because of operative effect of the act as applied to the respective plans."

At page 350, it is further stated:

> "Whether the conversion of Union Central or Ohio National from a stock to a mutual company is beneficial to the policyholders is not for us to say; that question, under the provisions of the act, is left to the policyholders to decide, and whether the payment of the price,

as stipulated in the respective plans, for the outstanding shares of the capital stock is inequitable to the policyholders or would involve the financial structure of the companies is a question for decision by the superintendent, at such time as the plan is submitted to him for approval."

At page 352, the court stated:

"We assume that the superintendent will do his full duty, and if that be true, these policyholders will not be deprived of their property without due process of law, nor will the obligations of their contracts be impaired.

In the case of *State ex rel. Herbert* v. *Ferguson, Auditor,* 142 Ohio St. 496, 52 N. E. (2d) 980, this court by a unanimous decision held 'constitutional questions will not be decided until the necessity for a decision arises on the record before the court.' "

An examination of the entire opinion rendered by the Supreme Court of Ohio does not disclose that a determination of the constitutionality of the statutes was necessary to its decision of the case.

Under the Ohio statute to effectuate mutualization, four consecutive separate steps are required. They are:

(a) Action by the directors;
(b) Action by the stockholders;
(c) Action by the policyholders at a meeting to be held for the purpose;
(d) Findings by the Superintendent of Insurance after the completion of the first three steps.

The record shows that the first two steps had been taken and that thereafter the meeting of policyholders was adjourned from time to time and ultimately was held and, before a vote was taken, was adjourned to reconvene at the call of the Superintendent of Insurance. It has never been reconvened. Necessarily no action has been taken or could

be taken by the policyholders. As to the fourth step we call to the court's attention the statement by appellant on page 16 of appellant's Statement as to Jurisdiction, that "the chances are that the Superintendent of Insurance would not consent to preside at a meeting of the policyholders to consider a plan to which he had any objection," and the appellant's further statement "appellant was confronted with this situation and he had the right to assume that the Superintendent of Insurance would approve the plan." The court will bear in mind that under Section 9364-1, General Code of Ohio, the Superintendent of Insurance was ordered by statute to supervise the procedure of the meeting.

It will also be borne in mind that no facts are shown in the amended petition warranting the conclusion that plaintiff-appellant could sustain any loss by reason of the mutualization.

In view of the foregoing, the decision of the Supreme Court of Ohio was proper in holding that there was not shown "a presently existing state of facts which makes such act unconstitutional and void when applied thereto" and further, the court was led to include therein: "Constitutional questions will not be decided until the necessity for a decision arises on the record before the court."

It is well established by the decisions of this court that a judgment of a state court which is put upon grounds which include a non-federal ground, independent of the federal question involved and broad enough to sustain the judgment, will not be reviewed by this court.

Petrie v. *Nampa & Meridian Irrigation District,* 248 U. S. 154; *Eustis* v. *Bolles,* 150 U. S. 361; *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157; *Fox Film Corp.* v. *Muller,* 296 U. S. 207; *McCoy* v. *Shaw,* 277 U. S. 302; *Klinger* v. *Missouri,* 80 U. S. 257; *Leathe* v. *Thomas,* 207 U. S. 93;

Parson Son & Co. v. *Bird*, 248 U. S. 268; *Browne* v. *Union Pacific R. R. Co.*, 267 U. S. 255.

Appellant's contention is that any reorganization that reduces the financial ability of the insurance company must be invalid since it reduces the "cushion" for the protection of policyholders, regardless of its financial condition and without allegations or proof of present or prospective loss to appellant policyholder. There is no contention that the corporation is insolvent or will be rendered insolvent and the answer shows that the completion of the mutualization would leave the company with many millions of dollars of surplus.

It is respectfully contended that no federal question is presented.

Motion to Dismiss Appeal or, in the Alternative, to Affirm

Pursuant to Section 12, Paragraph 3, of the Rules of the Supreme Court of the United States, appellee respectfully moves that the appeal be dismissed or, in the alternative, that the judgment be affirmed on the grounds herein set forth in its Counter-Statement of Facts as to Jurisdiction.

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